

1215 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PATIENT OR RESIDENT — § 940.225(2)(g)**Statutory Definition of the Crime**

Second degree sexual assault, as defined in § 940.225(2)(g) of the Criminal Code of Wisconsin, is committed by one who is an employee of a (type of facility or program)¹ and has sexual (contact) (intercourse) with a (patient) (resident) of that (facility) (program).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was an employee of (name of facility or program).²
2. (Name of victim) was a (patient)³ (resident)⁴ of (name of facility or program).⁵
3. (Name of facility or program) was (an adult family home) (a community based residential facility) (an inpatient health care facility) (a state treatment facility).⁶
(Name alternative selected) is (specify the part of the statutory definition that applies).⁷
4. The defendant had sexual (contact) (intercourse) with (name of victim).

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF

“SEXUAL INTERCOURSE” AND INSERT THE APPROPRIATE DEFINITION HERE.

Consent to sexual (contact) (intercourse) is not a defense.⁸

Jury’s Decision

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1988 as Wis JI-Criminal 1217.3 [for sexual intercourse offenses] and Wis JI-Criminal 1217.4 [for sexual contact offenses]. Those instructions were revised in 1990 and 1994. A revision combining the instructions as Wis JI-Criminal 1215 was published in 1996 and revised in 2002 and 2007. This revision was approved by the Committee December 2021; it added to the comment.

The revised instruction provides for inserting definitions of “sexual contact” and “sexual intercourse” provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

This instruction is for violations of § 940.225(2)(g), as amended by 1993 Wisconsin Act 445, effective date: May 12, 1994.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault “against an individual who is 60 years of age or older.” Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(2)(g) was amended by 1993 Wisconsin Act 445. The former statute applied to an employee of “an inpatient facility or a state treatment facility.” The revised statutes applies to an employee of “a facility or program under s. 940.295(2)(b), (c), (h) or (k).” Those facilities or programs are:

- (2)(b) an adult family home
- (2)(c) a community-based residential facility
- (2)(h) an inpatient health care facility
- (2)(k) a state treatment facility

The Committee recommends naming the type of facility in this paragraph, for example: “. . . an employee of a state treatment facility.”

2. Here insert the name of the facility or program. For example: “St. Mary’s Hospital.”
3. “Patient” is defined as follows in § 940.225(5)(am):

“Patient” means any person who does any of the following:

1. Receives care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employee of a facility or program or from a person providing services under contract with a facility or program.

2. Arrives at a facility or program under s. 940.295(2)(b), (c), (h) or (k) for the purpose of receiving care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employee of a facility or program under s. 940.295(2)(b), (c), (h) or (k), or from a person providing services under a contract with a facility or program under s. 940.295(2)(b), (c), (h) or (k).

4. “Resident” is defined as follows in § 940.225(ar): “. . . any person who resides in a facility under s. 940.295(2)(b), (c), (h), or (k).”

5. Here insert the name of the facility or program. For example: “St. Mary’s Hospital.”

6. Here insert the name of the facility or program and select the applicable type of facility or program. For example: “St. Mary’s Hospital was an inpatient health care facility.”

7. Here name the applicable type of facility or program and select the relevant part of the statutory definition for that type of facility or program. For example: “An inpatient health care facility is any hospital licensed or approved by the Department of Health and Family Services under (specify licensing statute).”

Section 940.225(2)(g) applies to offenses involving employees and patients or residents in facilities or programs “under s. 940.295(2)(b), (c), (h), or (k).” Those subsections of § 940.295 refer to definitions in other statutes, resulting in extensive and complex references. The Committee recommends that care be taken to assure that essential parts of the applicable definitions are included.

The facilities or programs under s. 940.295(2)(b), (c), (h), or (k) and the cross-referenced definitions are as follows:

- (2)(b) adult family home. § 940.295(1)(am) provides that “‘adult family home’ has the meaning given in s. 50.01(1).”
- (2)(c) community-based residential facility. § 940.295(1)(c) provides that “‘community-based

residential facility’ has the meaning given in s. 50.01(1g).”

- (2)(h) inpatient health care facility. § 940.295(1)(i) provides that “‘inpatient health care facility’ has the meaning given in s. 50.135(1).”
- (2)(k) state treatment facility. § 940.295(1)(r) provides that “‘state treatment facility’ has the meaning given in s. 50.01(15).”

Many of the cross-referenced definitions include their own references to other statutes, sometimes to indicate exceptions. The potential for complexity is illustrated by State v. Powers, 2004 WI App 156, ¶6, 276 Wis.2d 107, 687 N.W.2d 50, where the court of appeals held that an employee of a health care facility operated by the United States Department of Veterans Affairs [the VA Medical Center at Tomah] is not subject to prosecution for an alleged violation of § 940.225(2)(g). As applicable to this situation, sub. (2)(g) requires that the victim of the offense be a patient or resident of a facility or program under § 940.295(2)(h) – an inpatient health care facility. Section 940.295(1)(i) provides that “‘inpatient health care facility’ has the meaning given in s. 50.135(1).” Section 50.135(1) requires that this type of facility be licensed by the state. The state conceded that as a VA facility, the Tomah Medical Center is not licensed by the state, so the court held that § 940.225(2)(g) does not apply.

While Powers was an appeal of the denial of a pretrial motion, the Committee concluded that the state must prove that the facility or program involved in the case is covered by one of the referenced definitions. If not agreed to by the parties, this will present a factual issue for the jury.

8. Section 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g).”